IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-558

RAYMOND MOTOR TRANSPORTATION, INC.
a Minnesota Corporation,
and
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,
*Appellants,*

*v.*

ZEL S. RICE, ROBERT T. HUBER, JOSEPH SWEDA, REBECCA YOUNG, WAYNE VOLK, LEWIS V. VERSNIK, and BRONSON C. LA FOLLETTE,
*Appellees.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN**

*MOTION TO DISMISS*

BRONSON C. LA FOLLETTE
*Attorney General*
CHARLES A. BLECK
*Assistant Attorney General*
ALBERT HARRIMAN
*Assistant Attorney General*
*Counsel for Appellees*

Post Office Address:
114 East, State Capitol
Madison, Wisconsin 53702

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CASES CITED







WISCONSIN STATUTES



ADMINISTRATIVE REGULATIONS

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The appellees move this Court to dismiss the above-captioned appeal for the lack of a substantial federal question.

*QUESTIONS PRESENTED*

Does Wisconsin's refusal to permit twin trailers on the Interstate Highways in Wisconsin violate the Commerce Clause by placing a burden on interstate commerce which outweighs any legitimate local interest?

Does the Wisconsin regulatory scheme for vehicles unconstitutionally discriminate against interstate commerce?

## STATEMENT OF THE CASE

Wisconsin highways are filled with motor vehicles which range in size from the smallest automobiles to the largest trucks and trailers. In the interest of traffic safety, Wisconsin has placed limits on the size of such vehicles. The width, height, length and weight of vehicles are regulated by ch. 348, Stats. Subject to certain exceptions to be hereinafter discussed, sec. 348.07, Stats., limits the length of single vehicles to 35 feet and combinations of 2 vehicles to 55 feet. The legislature has refused to increase this 55 foot limit to 65 feet. Section 348.27(6), Stats., authorizes the Highway Commission to permit the operation of trailer trains up to 100 feet long. An example of this would be the long trains of refuse wagons in use at one time in the City of Milwaukee. Because of the obvious dangers of such lengthy vehicles the Highway Commission has chosen to make very limited use of this power. In fact, that Commission has, by rule, limited such permits to vehicles hauling municipal refuse, and unloaded vehicles in transit from the manufacturer or dealer to the purchaser or dealer, or for the purpose of repair. Wis. Adm. Code section Hy 30.14(3)(a).

The appellants made application to the Highway Commission under this rule for permits to operate 65 foot twin trailer units on certain Wisconsin highways. The permits were denied because such operation is not within the language of the rule. The Highway Commission has not changed this rule because the legislature has indicated it does not favor the change. The legislature has not changed the law to conform with the wishes of the trucking industry because the people of the state have made it clear that they do not want any more longer trucks on the highways. (Huber deposition, pp. 26-29)

In other instances in the past the legislature has yielded



to the pressure of the trucking industry and has enacted a number of exceptions permitting larger size vehicles and loads. Examples are the transportation of long poles, pipes, and girders, permits for industrial interplant and plant to state line operations, mobile home permits, pulpwood permits, and auto carrier permits. Now the trucking industry, as represented by these appellants, comes into court saying that because the legislature and the Highway Commission made exceptions for these others, they now are duty bound to make a further exception for 65 foot twin trailers regardless of the commodity hauled. It is contended that failure to make further exceptions for the benefit of these appellants constitutes a denial of equal protection of the laws and an undue burden on interstate commerce. They now ask the court to impose upon Wisconsin highways more long trucks, against the will of the legislature, the Highway Commission, and the people of this state.

## ARGUMENT

### I. No Substantial Federal Question Is Presented.

*A. Refusal to allow 65 foot twin trailers is not a denial of equal protection of the laws.*

1. There is no direct discrimination against interstate commerce as such.

The appellants recognize that the statutes and administrative rules here challenged are presumed to be constitutional, and that they have the burden of overcoming this presumption beyond a reasonable doubt. They have presented voluminous evidence to show that 65

foot twin trailers have a good safety record and to show that Wisconsin's refusal to allow such trailers on its highways increases the cost of their interstate movements. They point out that the law is clear that a state may not discriminate against interstate commerce in favor of local commerce. Of course, we agree. Then they say we do discriminate directly against interstate commerce and that this places upon us the burden of showing a compelling state interest to justify such discrimination. They say that we have not met this burden and thus, they have shown an undue burden upon interstate commerce. All of these conclusions depend on an initial determination as to whether we do discriminate against interstate commerce as such. In this section of the brief we will demonstrate that there is no direct discrimination against interstate commerce.

In this respect, it will be helpful to examine the specific discriminations complained of to see if they are aimed directly at interstate commerce as such.

Under sec. 348.27(5), Stats., special permits can be obtained for hauling overlength poles, pipes and girders. Nothing in this statute indicates that such permits are available for intrastate commerce only. Such permits are, in fact, available regardless of whether the move will be intrastate or interstate. Appellants have made no showing that the Highway Commission discriminates against interstate commerce in this regard.

Under the same statute permits are issued for auto carrier haulaways transporting automobiles both in intrastate and interstate commerce. Nothing in the statute or in the practice of the Highway Commission results in a discrimination against interstate commerce and in favor of intrastate commerce in this regard.





Section 348.27(7), Stats., authorizes mobile home permits for transporting mobile homes in this state. Nothing in the statute requires, or in the practice of the Highway Commission results in, discrimination against interstate commerce. Such permits are freely given to transport mobile homes within the state, and from this state to points outside the state, and from points outside the state to points inside the state. Appellants have not shown that interstate commerce in mobile homes is discriminated against.

Under sec. 348.27(9), Stats., the Highway Commission can issue overlength permits for the transportation of poles and pulpwood for a distance not to exceed three miles from the Michigan-Wisconsin state line. This was a concession to the trucking companies which haul poles and pulpwood to a pulpwood plant at Niagara, Wisconsin. As to any of these loads which originate in Michigan, it was necessary to have a Wisconsin permit so that the longer loads permitted in Michigan could be hauled all the way to the Wisconsin plant. This is, of course, a direct discrimination in favor of interstate movements from Michigan to Wisconsin. This statute would not authorize a permit for an overlength load of pulpwood from a point in Wisconsin located farther than three miles from the Wisconsin-Michigan line. Thus, there is, in fact, a discrimination against intrastate commerce.

Under sec. 348.27(8), Stats., and Wis. Adm. Code section Hy 30.14(3)(a), trailer train permits may be issued for hauling municipal refuse and for the interstate or intrastate operation of empty vehicles in transit from manufacturer or dealer to purchaser or dealer or for the purpose of repair. As to that part of this rule applicable to empty vehicles, the rule specifically states that it applies to interstate commerce. In fact, most of such moves would be interstate in nature. As to municipal waste, nothing in the

statute, rule, or practice of the Highway Commission indicates that this does not apply to interstate commerce as well as intrastate commerce.

Section 348.27(4), Stats., authorizes permits for the operation of oversize vehicles in connection with interplant, and from plant to state line operations in this state. As to the interplant operation within the state, it is by its very nature, only an intrastate movement. This has no bearing on interstate commerce. As to the operation from a Wisconsin plant to the state line, this is, in fact, an interstate movement. Thus, a permit for such movement is in no sense a discrimination against interstate commerce. Appellants have pointed out that we will not grant a permit for interplant movement from a plant located outside the state to a plant located inside the state. Regardless of whether the court would think this is a significant discrimination against interstate commerce, it is clear that appellants have no standing to raise this question because it does not directly affect their rights. The only person who could raise such question would be a person with a plant in Illinois, for example, who applied for an interplant permit to haul from his Illinois plant to his plant in Wisconsin. Appellants do not fall into this category. Thus, it is clear that they are trying to raise a constitutional question on a point which affects the rights of others. The law is clear that a party must try his own case and may not urge the unconstitutionality of a statute on a point not affecting his rights. A party may not challenge the constitutionality of a statute on the ground that it may be applied unconstitutionally to others. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Scharping v. Johnson*, 32 Wis. 2d 383, 145 N.W. 2d 691 (1966).

Thus, it is clear that there is in the statutes, rules, and practices complained of no discrimination aimed directly at interstate commerce as such.



2. The differences in treatment complained of are based upon reasonable classifications which are permissible under the equal protection clause.

Appellants admit that, if there is no discrimination directly against interstate commerce as such, then they have the burden of showing the classifications are arbitrary, capricious, and without rational basis. Classifications must rest on some ground of difference having a fair and substantial relation to the object of the legislation. They also say that the possible public interests here to be served are highway safety, preservation of the roads, and promotion of efficient transportation, and that any classification made by the state must bear a fair and substantial relationship to these purposes. With this we agree, except that the statement of these purposes is too restrictive. The law is full of illustrations where the police power, as well as the tax power, is exercised in such a way as to benefit a group of persons or industries. The law is clear that, as long as such differences of treatment bear a fair and substantial relationship to a permissible public purpose, there is no denial of equal protection. In this respect we differ with the appellants as to what constitutes a permissible public purpose for the exercise of the police power. Special privileges extended through the exercise of the police power to agriculture, labor, small business, the indigent, and veterans, for example, are commonplace in our society. One would not be surprised to find special police power concessions to orange growers in Florida, cotton growers in Louisiana, auto manufacturers in Michigan, dairy farmers in Wisconsin, grain in Montana, lumber in Oregon, and grapes and lettuce in California. It is clear that the promotion of such interests is in the public interest and a proper public purpose.

Many cases have sustained the validity of favored treatment of farmers as against a charge of denial of equal protection. In *Northern Wis. Co-operative Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N.W. 936 (1924), the court upheld the co-operative marketing law as a proper exemption given to farmers, which did not constitute a denial of equal protection. In *Wis. Truck Owners Assn. v. P.S.C.*, 207 Wis. 664, 242 N.W. 668 (1932), the court upheld a ton-mile tax law exemption of motor vehicles used or operated exclusively in transporting dairy or other farm products, as against a charge of denial of equal protection. In *State v. Wetzel*, 208 Wis. 603, 243 N.W. 768 (1932), the court upheld the exemption of implements of husbandry from length restrictions applicable to other vehicles on the highway, as against an equal protection challenge.

In *Oregon v. Pyle*, 226 Or. 485, 360 P. 2d 626 (1961), a statute allowed heavier axle weights for trucks hauling logs, poles or piling than for trucks hauling other products. It was there argued that no valid distinction can be drawn on the basis of the nature of the load because an overload of logs will cause as much damage to the highway as an overload of any other commodity. The court pointed out that protection of the highway is only one of the purposes of the statute. The court found that another purpose of the statute was to benefit the logging industry. The court concluded that such special treatment afforded the haulers of logs, poles, or piling can be justified on the ground that the legislature desired to foster the logging industry through special benefits afforded to those hauling the raw products of the forests. The lumbering business is one of the principal businesses of the state, on which a large part of the population is dependent, and the state is interested in encouraging and developing this industry. It is within the power of the legislature to grant special benefits to one branch of industry in order to promote the public good. The court found the classification reasonable and that it did not



violate the equal protection clause. The similarities between this case and the one presently before this court are apparent. There the argument was made that an overload of logs damages the road as much as an overload of any other commodity and, therefore, the classification was improper and not related to a proper public purpose of protecting the road. Nevertheless, the court found another public purpose to promote the logging industry. This was enough to save the classification. In the case presently before this court the appellants argue that classifications in the Wisconsin law benefit local industry such as pulpwood, pole and pipe transportation, mobile homes, automobile manufacture, and others, by allowing them to haul loads longer than 55 feet while restricting the haulers of other general commodities to a maximum length of 55 feet. Since a 65 foot truck hauling one product is as safe or dangerous on the highway as a 65 foot truck hauling another product, appellants argue that the restriction they face bears no reasonable relation to highway safety and is, therefore, unreasonable, arbitrary, and constitutes improper classification. In making such argument they ignore the fact that the promotion of local industry is in the public interest and a proper public purpose.

A good example of this is the mobile home industry. Mobile homes are a principal source of low cost housing for low income families. They cannot be moved by railroad for several reasons including the fact that the rails do not run up to the mobile home parks and other locations where they are to be delivered. If low income families are to be allowed the advantage of this source of low cost housing some way has to be found to move mobile homes on the highways. Nobody wants them on the highways. They are too wide and too long, and move too slowly. They crowd the centerline or run on the shoulder on curves. They tip over easily. They are a nuisance and a danger on the highway. We do not permit them on the highway because they are

safe. We permit them on the highway because there is a great public need for them and we restrict this movement to avoid as much danger as possible.

Another good example is the hauling of long poles upon the highway. Telephone and power line poles have to be of a substantial length to be useful. They can't be cut in half and reconnected at the site where they are to be set in the ground. They have to be transported by highway because in most instances they are set within the highway right of way. They are not allowed to be hauled upon the highway because they are so safe. Such hauling is tolerated on the highway because it is a practical necessity and serves the public interest. In this respect appellants seem to be saying that because their vehicles are safer than mobile homes and long poles, Wisconsin is duty bound to permit them upon its highways.

Appellants suggest that the statute permitting 65 foot auto carrier haulaways was enacted because Wisconsin desires to promote its auto industry. If this were true, the law is clear that the police power can be exercised in such a way as to promote certain industries and that this is a proper public purpose. It is more likely, however, that the extra length for auto carriers was authorized for the benefit of that part of the trucking industry which hauls automobiles, in order to help that struggling industry remain in business against the growing competition of the railroads which threaten to take such business away from the truckers. Here again the appellants are saying that because the state gave an advantage to one segment of the trucking industry, it must give the same advantage to them because their trucks are just as safe. This ignores the reason why the advantage was given to the auto carriers. The police power may be exercised to benefit an industry. This is a proper public purpose and supports the classification involved.



It is more likely that the industrial interplant permits were authorized to benefit the automobile industry. American Motors, the smallest member of the auto industry, transports auto bodies from Milwaukee to its assembly plant in Kenosha. (Volk, p. 31) That Wisconsin might want to give American Motors an assist in its competition with the giants of the industry is fully understandable. Such a use of the police power is permissible.

In *Sproles v. Binford*, 286 U.S. 374 (1932), the court dealt with a Texas law regulating the size and weight of motor vehicles on highways. The court held that limitations of size and weight are manifestly subjects within the broad range of legislative discretion, and that absent national legislation covering interstate commerce, a state may rightly prescribe uniform regulations to promote safety upon its highways. The law was challenged as a denial of equal protection because it exempted from the limitations as to size, implements of husbandry, well drilling machinery, and road building machinery. The court had no difficulty upholding these exemptions. The law also fixed approximately the same limit of length for individual motor vehicles as for combinations of vehicles. The court concluded that if the state saw fit in this way to discourage the use of such trains or combinations on its highways, there is no constitutional reason why it should not do so. The law also allowed greater vehicle length when the vehicle is being operated between points of origin or destination and common carrier receiving or loading and unloading points. It was pointed out that these are relatively short trips, and the court concluded that the legislature in making its classifications is entitled to consider the frequency and character of the use and adapt its regulations to the classes of operation, which by reason of their extensive use of the highway brought about the conditions making the regulations necessary. It was

argued that this was designed to favor railroads over motor trucks. The court concluded that, if this was the motive, it does not follow that the classification would be invalid. The state has a vital interest in the appropriate utilization of the railroads which serve its people. The law also permitted heavier loads to be hauled on buses than on trucks. It was argued that the damage to highways is as great from a load of persons as from a load of freight. The court said this would be controlling if there were no other reasonable basis for classification other than weight. The court said the state has a distinct public interest in the transportation of persons. Persons and property need not be treated as falling within the same category for purposes of highway regulation. The importance of promoting employment and recreation, and the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible transportation, are sufficient to support a classification of passenger traffic as distinct from freight. This classification does not lack a rational basis.

Thus, the Supreme Court at an early stage in the development of commercial highway transportation recognized that limitations of size are within the police power of the state to promote highway safety, and that exceptions for certain vehicles such as implements of husbandry, well drilling and road machinery are permissible. They also held that a state could discourage vehicle trains on its highways, and that the state can consider the length of trips in granting extra length restrictions, and can so regulate highways as to benefit railroads. It was also held that buses may carry heavier loads than trucks even though damage to the road is the same regardless of whether people or freight are being hauled. This was because there was a reasonable basis for the classification other than highway damage. This clearly refutes the contention of the appellants that the only



permissible purposes of highway regulation in which there is a public interest are highway safety, protection of the highway from wear, and reducing highway congestion. This case stands for the proposition that in addition to such police power purposes, highway regulations may contain exemptions which are not necessarily directed at safety, but which promote the interests of farmers, well drillers, road builders, and railroads, as well as promoting improved social relationships among people. There are public interests here involved which are not directly related to highway safety. Nevertheless, classifications which promote such interests have a rational basis and do not violate equal protection.

In *Morris v. Duby*, 274 U.S. 135 (1927), the court said, of course, the state may not discriminate against interstate commerce, citing *Buck v. Kuykendall*, 267 U.S. 307 (1925), and went on to quote from that case as follows:

> "'With the increase in numbers and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire — promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject . . .'"

The court in the *Morris* case went on to say:

> "The mere fact that a truck company may not make a profit unless it can use a truck with a load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable . . . ."

The decision in this case, taken together with the decision in *Sproles v. Binford, supra*, clearly establishes that length of vehicles and trailer trains have a relation to highway safety, and that a state may prohibit long trucks and trailer trains, and that such classifications are reasonable. Appellants do not really dispute this basic conclusion, except to argue that, because we permit some other vehicles of similar length and articulated configuration, we must also permit plaintiffs long, articulated vehicles. We have shown above that our different treatment of certain others is based upon principles of reasonable classification which do not violate equal protection.

### B. *Wisconsin's refusal to permit 65 foot twin trailers on its highways is not an undue burden upon interstate commerce.*

#### 1. The court uses a balancing test.

Appellants' principal argument is that our refusal to allow 65 foot twin trailers generally, at least upon our interstate highways, is an undue burden upon interstate commerce. They point out how this affects their profits and ask the court to balance this burden against the safety aspects involved. They ask the court to find that their financial burden outweighs the safety considerations and that, therefore, such burden constitutes an undue burden on interstate commerce. With this in mind, it will be helpful to summarize some of the leading cases in this field.

An early case was *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938). State law prohibited the use on state highways of trucks and semi-trailers exceeding 90 inches in width and 20,000 pounds in weight, and the principal question was whether these prohibitions impose an unconstitutional burden on



interstate commerce. The court held that they do not. The court said:

> " . . . Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce . . . "

Continuing, the court said that the state may not under the guise of regulation discriminate against interstate commerce. However, in the absence of national legislation, especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. The court further said that Congress may determine whether the burdens imposed by state regulation are too great, and may by legislation curtail to some extent the state's power. But that is a legislative, not a judicial, function to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which state power should yield to national authority. The court concluded that in the absence of such federal legislation the judicial function under the commerce clause stops with the inquiry whether the state legislature acted within its province and whether the means of regulation chosen are reasonably adapted to the end sought. Courts do not sit as legislatures and cannot act as Congress does when, after weighing conflicting interests, it determines when and how much the state regulatory power shall yield to the larger interests of national commerce. A court is not called upon, as are state legislatures, to determine what in its judgment is the most suitable restriction to be applied, or to choose that one which in its opinion is best adapted to all the diverse

interests affected. The court went on to point out that when the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. This applies equally where interstate commerce is involved, and courts are not anymore entitled, because interstate commerce is affected, to substitute their own for the judgment of the legislature. Since the regulation is a legislative, not a judicial, choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. The court said they would examine the record, not to see if the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. The court concluded as to weight limits that the fact that many other states have adopted a different standard is not persuasive. The legislature, being free to exercise its own judgment, is not bound by that of other legislatures. It would hardly be contended that if all the states had adopted a single standard none, in the light of its own experience and in the exercise of its own judgment upon all the complex elements which enter into the problem, could change it.

*Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), involved the question whether a state law limiting the length of trains constitutes an undue burden on interstate commerce. The court found that the benefit of short trains in reducing accidents due to slack action was more than offset by the increased number of accidents caused by running more trains. The court also found a great burden on interstate commerce due to the necessity of breaking up long trains for operation through the state and then



reassembling them into long trains again on leaving the state. The court concluded (325 U.S. 781, 782) that here the state has gone too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of an accident. The court further concluded (325 U.S. 783, 784), that here, examination of all relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail. However, they distinguished this situation from that involving state control of its highways, and said (325 U.S. 783), that *South Carolina State Highway Dept. v. Barnwell Bros., supra*, was concerned with the power of the state to regulate the weight and width of motor cars passing interstate over its highways, a legislative field over which the state has a far more extensive control than over interstate railroads.

In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), an Illinois statute required that all trucks have a certain type of curved mud guard, rather than the conventional mud flap which was legal in at least 45 other states. Arkansas prohibited the curved mud guard and required straight mud flaps. The Illinois statute was challenged as an undue burden on interstate commerce. The court said that unless they can conclude on the whole record that the total effect of the law as a safety measure is so slight as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it, they must uphold the statute. There was substantial cost involved in installing the new mud guards and their safety benefits were not at all clear. The court said that if it were only these cost and safety factors involved, they would sustain the law. The court went on to

point out the burden on interstate commerce caused by the need to install the new mud guards upon entering Illinois. The court concluded that this is one of those cases, few in number, where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce. The court further concluded that the present showing, balanced against the clear burden on commerce, is far too inconclusive to make this mud guard regulation meet the test.

*Brotherhood of Loc. F & E. v. Chicago, R. I. & P. R. Co.*, 393 U.S. 129 (1968), held the Arkansas full train crew law was not an undue burden on interstate commerce. The lower court had found based upon the evidence that the full crew laws had no substantial effect upon safety, and that the financial burden of compliance was out of all proportion to the benefit, if any. The Supreme Court said that the lower court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the commerce clause. The evidence was conflicting and inconclusive, and the court after summarizing the evidence, concluded that this summary leaves little doubt that the question of safety in the circumstances of this case is essentially a matter of public policy which under our constitutional system can only be fixed by the people acting through their elected representatives. The lower court's responsibility for making findings certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion. Nor was it open to the lower court to place a value on the additional safety in terms of dollars and cents in order to see whether this value exceeded the financial cost to the railroads. The court concluded that it is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways.

The full crew law, because it did not apply to small



mileage railroads, was not applicable to intrastate railroads, while it did apply to interstate railroads. In the face of this direct discrimination against interstate commerce, the court concluded that the difference in treatment based on differing track mileage might have a rational basis, because the short-line roads run slower, and run shorter trains. Also the smaller railroads would be less able to bear the additional cost. Finally, the court concluded these disputes will continue to be worked out in the legislature. However, in the absence of congressional action, the court would not invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry.

2. Prohibition of twin trailers does not prevent interlining.

Appellant, Consolidated, points out that they have to divide twin trailers in Wisconsin, run some 55 foot semis in lieu of twins, and operate twins in longer mileage around Wisconsin, which costs them some $2,000,000 a year. They have minimized this burden so well by cost and service conscious management that their operating ratio is substantially better than the industry average. Operating ratio is the ratio of operating expense to revenues. Consolidated's average is 92.4 which shows they have held their costs down better than the industry as a whole which has a 94.5 average. (Wrightson affidavit, pp. 4, 15) While $2,000,000 is no small sum, these figures show that Consolidated is able to operate more efficiently than competitors in spite of this disadvantage. However, in the *Bibb* case, *supra*, the court pointed out that such a cost showing alone is not enough to overturn the law. In that case the court found an undue burden on interstate commerce because the necessity of installing the curved mud guards upon entering Illinois made interlining

impossible. Interlining is the practice in the trucking industry of exchanging trailers between lines, the same as railroads haul each other's cars. The court said this is one of the cases, few in number, where a local safety measure has to yield because of the burden on interstate commerce. Appellants here contend that their case also is one of those cases, few in number. They contend that they can't interline because of Wisconsin's twin trailer ban. Apparently, they mean that another trucking company cannot pick up one of their trailers and haul it with one of its own, in twin trailer style, through Wisconsin. This is, of course, true, but this does not prevent interlining; it only makes it more expensive. In *Bibb* a trucker could not pick up another's trailer without the curved mud guards and haul it through Illinois. However, a trucker can readily pick up another's trailer and haul it through Wisconsin, because we have no equipment requirements that keep that trailer out of Wisconsin. What the trucker cannot do is pick up two trailers, or one trailer added to one of his own, and then haul them both through Wisconsin. Either trailer can be hauled singly through Wisconsin. This does not prevent interlining; it only makes it more expensive, and the court has held that expense alone is not enough to overturn the law.

In the *Bibb* case the problem was that Illinois was the only state which required the curved mud guards. They were legal but not required in most other states except Arkansas, which prohibited their use and required the standard mud flap which was also legal in most states. Thus, the curved mud guard was legal in all states but one. The situation with 65 foot twin trailers is not the same. Many states allow them, but many states prevent them. The evidence in this case includes a colored map of the United States. Shown in blue are the states which permit 65 foot twin trailers. There are certain exceptions. In Iowa they are limited to 60 feet. In New York, Massachusetts,



and Florida, 65 foot twin trailers are permitted only on turnpikes which include the interstate highways. Shown in green, Mississippi, Georgia, and New Jersey allow twin trailers of less than 60 feet. Shown in yellow are the states which prohibit twin trailers entirely.

It is true that Wisconsin law does prevent running 65 foot twin trailers from Chicago through Wisconsin to Seattle. This can't be done through Iowa either. Similarly, 65 foot twin trailers cannot be run all the way from Chicago to Florida. Although they can be run on Florida's turnpikes and interstates, they can't get there because Tennessee, Mississippi, Alabama, and Georgia don't allow it. Similarly, 65 foot twin trailers cannot be run from Ohio to New York and Massachusetts, where they are legal on turnpikes and interstates, because Pennsylvania won't allow it. Also they cannot be run from Ohio to Maryland and Delaware, where they are legal, because they can't get through Pennsylvania and West Virginia. In all there are 20 states which prohibit, or limit the operation of 65 foot twin trailers. Of these, 17 states prohibit them entirely and 3 states prohibit them except on certain highways. This is nothing like the situation in the *Bibb* case where only one state required the curved mud guards. Here we have 17 states that prohibit 65 foot twin trailers and 3 that limit their use. In *Bibb* only one state was out of step with the rest of the country. Here, there are 17 to 20 states out of step with what are predominantly western states. The court in this case is not ruling on the constitutionality of the law of one state. In effect, the court will here be ruling on the constitutionality of the law of 17 states. We suggest that the *Bibb* case principle should not be extended to this extent.

3. Wisconsin's chief concern is the extra length of twin trailers.

Appellants' twin trailers have been denied permits primarily because they exceed statutory specification of maximum length of vehicles generally, which is 55 feet. Vehicle size bears a direct relation to safety. The court recognized this in *Morris v. Duby, supra*, where it quoted from a previous case to the effect that the increasing size of vehicles is increasing the danger, and excluding the larger vehicles promotes safety. In *Sproles v. Binford, supra*, the court recognized that limitation of the size of vehicles promotes safety and that there is no reason why states may not discourage the use of trains or combinations of vehicles. Thus, to exclude appellants' vehicles both because of their excessive length and their trailer train configuration is permissible in the interest of safety. However, appellants have shown that 65 foot twin trailers have a good safety record in other states. It is clear that officials of a number of states and the federal government are convinced that such vehicles are safe enough to be allowed on the highway.

Splash and spray tests were conducted on wet pavement but not during a rain, wind, or snow storm. They wanted to isolate the effect of the vehicle entirely from what happens when it is raining, so they didn't measure rain storm conditions. (Sherard deposition, pp. 37-39) While those test results may be useful, the problem facing Wisconsin drivers is passing or being passed by long trucks under stormy conditions. Mr. Sherard also claimed that the extra length of twins is an advantage in causing less splash and spray because of skin friction which actually pulls the air currents in tighter to the sides of the vehicle. The length of the vehicle gives the increased benefit. (Sherard deposition, pp. 18, 19, 49) It is doubtful that a Wisconsin driver who has been passed by a long truck in a storm would be willing to accept the proposition that there is less snow, slush or rain on his windshield than there would be if the truck were shorter. All he knows is that driving with an



obstructed windshield for an extra 10 feet of truck length is something he would prefer to avoid because of the obvious hazards involved.

Another witness pointed out that with a truck traveling at 50 miles per hour and a car traveling 10 miles per hour faster, it would take approximately two-thirds of a second longer to pass the additional 10 feet in length of the 65 foot twin trailers. This is an apparent attempt to show that the additional passing time for the longer trucks is insignificant. However, he admitted that with trucks and cars now allowed to travel the same speed, a car, which could go only two or three miles per hour faster than the truck, would take longer to get by the truck. (Easton deposition, pp. 39, 40) A Wisconsin driver is not likely to appreciate an extra two-thirds of a second or longer where his windshield is obscured by rain, slush or snow. The dangers are obvious.

4. The court should leave this problem to the legislature.

In *Barnwell*, the court held that states may regulate highway safety and that Congress may determine whether the burden on interstate commerce is too great. However, that is a legislative and not judicial function. The courts will not weigh the relative merits in the judicial scales, and will uphold the legislation if it has a rational basis. In the case presently before the court there is a sharp conflict in the evidence. While twin trailers have a good record in other states, there are obvious safety hazards in passing the extra length in bad weather. They also are heavier and can do more damage in collisions. The people of this state have shown great concern over these hazards. There is room for a difference of opinion and the opposition of the people is not irrational. In the *Southern Pacific* case the court admittedly weighed the state interest in train safety

against the national interest in interstate commerce and struck down the train length law as an undue burden on interstate commerce. In so doing the court carefully distinguished the situation in *Barnwell* and pointed out that a state has far more control over highways than railroads.

In *Bibb*, the court said it would uphold the law unless it can see that the benefits of the safety measure are so slight as not to outweigh the national interest. The court pointed out that because of the impact upon interlining, this is one of the few cases where the burden on commerce outweighs the safety measure. We have pointed out that this is not applicable to the case presently before the court, because here interlining is possible although not as profitable and the court in *Bibb* made it clear that high cost alone is not enough to overturn a law. In the *Full Crew Law* case, the court retreated from its balancing test and held that the evidence in that case left little doubt that the question of safety is essentially a matter of public policy which, under our constitutional system, can only be resolved by the people acting through their elected representatives. The court's responsibility does not authorize it to resolve the conflicts in the evidence against the conclusion of the legislature. The court left the problem to be worked out in the legislature. In view of the massive concern of the legislature, the Highway Commission, the Governor, the newspapers and the people of this state, we think the court should leave the present long truck controversy to be worked out by the legislature and the people of this state. This is especially true where a total length of 70, 75 or 85 feet would in all likelihood be equally as safe as 65 feet. The choice of how far to go is legislative and not judicial in nature.



## CONCLUSION

This appeal does not involve a substantial federal question for the reason that the *Bibb* case, *supra*, in effect, answers the questions here raised in favor of the constitutionality of Wisconsin's prohibition of twin trailers. The appeal should be dismissed on this ground.

Respectfully submitted,

BRONSON C. LA FOLLETTE
*Attorney General*

CHARLES A. BLECK
*Assistant Attorney General*

ALBERT HARRIMAN
*Assistant Attorney General*

*Attorneys for Appellees.*

Post Office Address:

114 East, State Capitol
Madison, Wisconsin 53702